TIFFANY CHEUNG (CA SBN 211497)
TCheung@mofo.com
DANIELLE VALLONE (CA SBN 302497)
DVallone@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

PURVI G. PATEL (CA SBN 270702)
PPatel@mofo.com
WHITNEY O'BYRNE (CA SBN 325698)
WOByrne@mofo.com
ERIK MANUKYAN (CA SBN 340307)
EManukyan@mofo.com
EMMA BURGOON (CA SBN 348097)
EBurgoon@mofo.com
MORRISON & FOERSTER LLP
707 Wilshire Boulevard, Suite 6000
Los Angeles, California 90017-3543
Telephone: 213.892.5200
Facsimile: 213.892.5454

Attorneys for Defendant
ORACLE AMERICA, INC.

Additional counsel on next page

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

Michael Katz-Lacabe and Dr. Jennifer Golbeck, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ORACLE AMERICA, INC., a corporation organized under the laws of the State of Delaware,

Defendant.

Case No. 3-22-cv-04792-RS

DEFENDANT ORACLE AMERICA, INC.'S MOTION TO DISMISS PORTIONS OF PLAINTIFFS' FIRST AMENDED COMPLAINT

Judge: Hon. Richard Seeborg

Date: October 5, 2023
Time: 1:30 p.m.
Courtroom: 3

Date Action Filed: August 19, 2022
FAC Filed: May 22, 2023
Trial Date: Not set

KYLE ZIPES (CA SBN 251814)
Kyle.Zipes@oracle.com
NARGUES M. EDER (CA SBN 260289)
Nargues.M.Eder@oracle.com
ORACLE AMERICA, INC.
500 Oracle Parkway
Redwood Shores, CA 94065
Telephone: 650.506.7000

Attorneys for Defendant
ORACLE AMERICA, INC.

NOTICE OF MOTION AND MOTION

TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on October 5, 2023, at 1:30 p.m., in Courtroom 3 located at 450 Golden Gate Avenue, 17th Floor, San Francisco, California 94102, Defendant Oracle America, Inc. will and hereby does move this Court for an order dismissing the following causes of action in Plaintiffs' First Amended Complaint on the grounds stated below, pursuant to Federal Rules of Civil Procedure 8 and 12(b)(6):[1]

1. Plaintiffs lack a basis to apply California law extraterritorially for the following causes of action:
    a) Intrusion Upon Seclusion Under California Law (Second Cause of Action); and
    b) Unjust Enrichment Under California Law (Seventh Cause of Action).
2. Plaintiffs fail to state a claim for relief for the following causes of action:
    a) Intrusion Upon Seclusion Under Florida Common Law (Third Cause of Action);
    b) Violation of the California Invasion of Privacy Act ("CIPA"), Cal. Penal Code §§ 630, *et seq.* (Fourth Cause of Action);
    c) Violation of the Florida Security of Communications Act ("FSCA"), Fla. Stat. § 934.03 (Fifth Cause of Action);
    d) Violation of the federal Wiretap Act, 18 U.S.C. §§ 2510, *et. seq.* ("ECPA") (Sixth Cause of Action);
    e) Unjust Enrichment Under California Law (Seventh Cause of Action);
    f) Unjust Enrichment Under Florida Law (Eighth Cause of Action); and
    g) Declaratory Judgment (Ninth Cause of Action).

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[1] On April 6, 2023, the Court granted in part and denied in part Oracle's motion to dismiss Plaintiffs' Complaint. (ECF No. 49 ("Ord.").) The Court denied Oracle's motion to dismiss as to Plaintiffs' claims for California invasion of privacy (on behalf of the proposed California subclass) and California intrusion upon seclusion (on behalf of the proposed California subclass). (*See id*. at 11-13.) Accordingly, Oracle does not move to dismiss those claims here, and will respond separately to those claims 30 days after the Court's rules on this motion, as stipulated. (ECF No. 60.)

This motion is based upon this Notice; the accompanying Memorandum of Points and Authorities; the pleadings, files, and records in this action; and such additional evidence and arguments as may be presented at the hearing of this motion.

Dated: June 28, 2023

MORRISON & FOERSTER LLP

By: */s/ Purvi G. Patel*
Purvi G. Patel

Attorneys for Defendant Oracle America, Inc.

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STATEMENT OF THE ISSUES TO BE DECIDED

The motion raises the following issues:

1. **Extraterritorial Application of California Law**. Whether Golbeck's California intrusion upon seclusion and unjust enrichment claims should again be dismissed because Golbeck has failed to allege any legal basis to apply California claims to her, a resident of Florida, or members of the putative nationwide class.
2. **Intrusion Upon Seclusion Under Florida Law**. Whether Golbeck's Florida intrusion upon seclusion claim should be dismissed because (a) she does not allege an invasion into a private quarter or place and (b) Oracle's alleged conduct does not constitute a highly offensive intrusion.
3. **California Invasion of Privacy Act (CIPA)**. Whether Katz-Lacabe's CIPA claim should be dismissed because he (a) again bases his claim on the collection of non-content record information contrary to the Court's prior ruling and (b) has failed to allege "willful" interception.
4. **Florida Security of Communications Act (FSCA)**. Whether Golbeck's FSCA claim should be dismissed because (a) the FSCA does not apply to common web analytics tools, (b) Golbeck had no reasonable expectation of privacy in her browsing activity, and (c) the alleged data intercepted was non-content record information.
5. **Federal Wiretap Act (ECPA)**. Whether Plaintiffs' ECPA claim should again be dismissed because (a) ECPA is a one-party consent statute and Oracle's customers have consented to Oracle's alleged collection of the information at issue, and (b) Plaintiffs have not alleged enough to satisfy ECPA's "crime-tort" exception.
6. **Unjust Enrichment Under California Law**. Whether Plaintiffs' claim for unjust enrichment under California law should again be dismissed because they have not shown that Oracle's alleged retention of a benefit was unjust.
7. **Unjust Enrichment Under Florida Law**. Whether Golbeck's claim for unjust enrichment under Florida law should be dismissed because she has failed to allege that (a) Oracle's alleged retention of any benefit was unjust, and (b) any alleged benefit was conferred directly on Oracle.
8. **Declaratory Judgment**. Whether Plaintiffs' claim for declaratory judgment should again be dismissed (a) to the extent Plaintiffs failed to state a claim for any underlying claim, and (b) because they fail to allege that they seek anything beyond what they seek in their underlying claims.

Oracle summarizes the grounds for dismissal for each cause of action, by Plaintiff, in the chart below:

Cause of Action	M. Katz-Lacabe	J. Golbeck
Intrusion Upon Seclusion Under California Law (Second Cause of Action)	• Court previously denied motion to dismiss (Ord. at 11-13.)	• No extraterritorial application, as the Court previously determined (Ord. at 19-21.)

Cause of Action	M. Katz-Lacabe	J. Golbeck
Intrusion Upon Seclusion Under Florida Law (Third Cause of Action)	• Not brought by Katz-Lacabe	• Failure to allege an intrusion into a private place that was highly offensive
California Invasion of Privacy Act (Fourth Cause of Action)	• Failure to allege "willful" interception and dismissal as to the types of data the Court has already determined do not to constitute actionable "content" (Ord. at 15-16.)	• Not brought by Golbeck
Florida Security of Communications Act (Fifth Cause of Action)	• Not brought by Katz-Lacabe	• Failure to state a claim (i) because the statute excludes tracking technology, such as the bk-coretag.js from its scope, and (ii) because Golbeck had no reasonable expectation of privacy in her web browsing activity • Dismissal as to the types of data the Court has already determined do not constitute actionable "content" (Ord. at 15-16.)
Federal Wiretap Act (Sixth Cause of Action)	• Failure to state a claim because, as this Court previously found, Oracle had the consent of at least one party to the alleged communications and the crime-tort exception does not apply (Ord. at 16.)	
Unjust Enrichment: California Law (Seventh Cause of Action)	• Failure to allege that Oracle's alleged retention of benefit was unjust	• No extraterritorial application
Unjust Enrichment: Florida Law (Eighth Cause of Action)	• Not brought by Katz-Lacabe	• Failure to allege that Oracle's retention of benefit was unjust or that she conferred a benefit "directly" on Oracle
Declaratory Judgment (Ninth Cause of Action)	• Fails to the same extent as underlying claims and for failure to allege they seek anything beyond what is sought in the underlying claims	

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Remaining Plaintiffs Michael Katz-Lacabe and Jennifer Golbeck continue to use this lawsuit to air their grievances with the advertising technology ("ad tech") industry at large. While broadly condemning standard and legally prescribed industry-wide practices, they once again ask the Court to take on the role of legislator to create a new legal privacy framework. Despite having pled "barely" enough for some of their claims to survive Oracle's first motion to dismiss, Plaintiffs do not allege any new facts to support the additional claims they try to bring, and they replead claims the Court has already rejected.[1] None of the facts alleged revive the claims the Court already dismissed, nor do they support Golbeck's new Florida causes of action.

Plaintiffs' core theory remains unchanged: Oracle America, Inc. ("Oracle"), through its Oracle Advertising ("OA") business, purportedly violates consumers' privacy by compiling and selling "dossiers" of their personal information. But OA does not compile and sell "dossiers" on specific individuals. Rather, OA provides its customers with access to "interest segments" (comprising pseudonymized groups of consumers likely to be interested in a certain topic, like "sports enthusiast"), which they can use to deliver more relevant and targeted advertising. Plaintiffs attach "Offline Access Request Response Reports" ("OARRR") to the FAC as "evidence" of the dossiers Oracle purportedly maintains,[2] but fail to acknowledge that Oracle creates OARRRs pursuant to the California Privacy Rights Act ("CPRA") as a legally required *consumer* right. It cannot be that Oracle's compliance with California's privacy law constitutes an invasion of privacy.

This is not the only instance in which Plaintiffs ignore that Oracle is lawfully operating within laws designed to protect California consumers. Despite acknowledging Oracle's status as a registered data broker, Plaintiffs broadly take issue with Oracle's alleged collection and sale of their personal information—actions expressly contemplated and permitted by statute.[3] They

[1] (*See* Ord. at 23.)

[2] (ECF Nos. 54 ("FAC"), 55-2, 55-3.)

[3] (*See* FAC ¶¶ 21, 26, 39, 89, 105 (citing Cal. Civ. Code § 1798.99.80, which defines "data broker" as an entity permitted to collect and sell to third parties the personal information of consumers with whom it has no direct relationship).)

further ignore that internet users are given the choice to opt out of the alleged data collection practices. For the second time, Plaintiffs' allegations do no more than support their individual positions that the entire online advertising industry *should* be illegal, even if no data privacy law currently exists that would render it so.

Plaintiffs unsuccessfully reassert claims rejected by this Court, including California claims on behalf of Golbeck (a Florida resident) and their putative nationwide class. Moreover, despite guidance from the Court, Plaintiffs are again unable to state a claim for relief under the vast majority of their causes of action. More critically, Plaintiffs' proffered view threatens to upend essential practices impacting how websites operate, including the use of third parties for basic functionality like hosting. Plaintiffs' position is untenable; they would have this Court find a wiretap or invasion of privacy every time a website routed any information through a third-party server—a routine action taking place constantly on almost every website. The Court should decline Plaintiffs' invitation to find a privacy violation simply because they do not like how the modern internet works. For the reasons provided herein, the Court should grant Oracle's motion to dismiss, this time, with prejudice.

II. THE AD TECH INDUSTRY PROVIDES TOOLS FOR BUSINESSES TO BETTER DELIVER TARGETED ADVERTISING

Oracle is a part of Oracle Corporation, an enterprise software company and cloud service provider. Oracle's business lines include OA, an enterprise-level suite of analytical tools for digital advertisers to deliver content to audiences most likely to be interested in that content. (*See* FAC ¶¶ 37-38 (describing how OA customers use OA's tools to deliver "targeted advertising" and "orchestrate a relevant, personalized experience for each individual").) Websites derive revenue based on how effectively they deploy ads, which in turn allows website owners to provide online services and content free of charge. In this way, online advertising powers today's internet by allowing ad tech companies to help businesses deliver targeted advertising to consumers. (*See* Ord. at 18 n.11 (describing Plaintiffs' free access to third-party websites as a benefit derived from the monetization of their data).)

The OA products at issue here (BlueKai, AddThis, and Datalogix),[4] like other products in the ad tech space, help businesses target their content to pseudonymized interest segments most likely to be interested in their campaign (*e.g.*, "sports enthusiast"). (*See* FAC ¶¶ 37-38.) For example, using the BlueKai Data Management Platform ("DMP"), OA customers can create targeted ad campaigns through which they can access OA-created interest segments on the Oracle Data Marketplace; these segments do not include any personally identifiable information. (*See, e.g.*, *id.* ¶¶ 36, 64(d).) OA's products are supported by information received from cookies (*id.* ¶ 43), bk-coretag.js (*id.* ¶¶ 44-50), tracking pixels (*id.* ¶ 51), device identification (*id.* ¶ 54), and cross-device tracking (*id.* ¶ 55)—technologies that Plaintiffs identify in the FAC.

Underlying each of these products is the Oracle ID Graph, which is an internal tool OA uses to connect the data that OA's customers and data partners have collected across marketing channels and devices. (*Id.* ¶ 37.) This functionality enhances, supports, and validates OA's products. (*Id.*) To ensure consumers' privacy, Oracle pseudonymizes all personally identifiable information it collects online. (*Id.* ¶ 60.) Moreover, it does not use any data it receives from customers to create sensitive interest segments, including those related to medical diagnoses, pregnancy, racial, religious, political or sexual orientation, citizenship or immigration status, and prohibits its customers from doing the same. (*Id.* ¶ 113 (quoting the Oracle Advertising Privacy Policy).) Consumers are not and cannot be harmed by Oracle's practices, which are ubiquitous in the digital world. Plaintiffs clearly wish to change the status quo, but legislation is the proper vehicle for such change, not litigation.

III. ARGUMENT

A. Plaintiffs Cannot Extend California Law to Non-Residents

Plaintiffs assert California claims for (i) intrusion upon seclusion and (ii) unjust enrichment on behalf of a putative nationwide class or, in the alternative, a California sub-class.[5]

[4] Plaintiffs mention "Moat Reach" and "Oracle Moat" once each in the FAC, both times in a footnote. (FAC ¶¶ 55 n.32, 114 n.146.) They fail to specify what, if any, claims they have against either one or what they mean by "Oracle Moat" (which is not an Oracle product).

[5] Plaintiffs also bring their ninth cause of action for declaratory judgment on behalf of a purported nationwide class. (FAC ¶¶ 264-67.) Because this claim "rise[s] and fall[s] with its other claims" (Ord. at 22), and Plaintiffs cannot extend their California claims nationwide, they similarly cannot extend their declaratory relief claim.

As before, the Court should reject Plaintiffs' attempt to apply California law extraterritorially to Golbeck, a resident of Florida, and the broader putative nationwide class. (*See* Ord. at 22 (dismissing the California intrusion upon seclusion claim as to Golbeck and Plaintiffs' putative nationwide class in part because of the significant legal differences in applicable law).) Dismissal with prejudice is warranted.

1. California's choice-of-law analysis requires dismissal of Golbeck's California intrusion upon seclusion and unjust enrichment claims

"A federal court sitting in diversity must look to the forum state's choice of law rules to determine the controlling substantive law." *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1187 (9th Cir. 2001), *amended by* 273 F.3d 1266 (9th Cir. 2001). Where, like here, "there is no advance agreement between the parties," California applies the governmental interest test to select the appropriate law. *In re Apple Inc. Device Performance Litig.*, 347 F. Supp. 3d 434, 445 (N.D. Cal. 2018), *on reconsideration in part*, 386 F. Supp. 3d 1155 (N.D. Cal. 2019).

California's governmental interest test is a three-step process. *See Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d. 581, 590 (9th Cir. 2012), *overruled on other grounds by Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLS*, 31 F.4th 651 (9th Cir. 2022). The first step of the inquiry is to ask whether the laws of the affected jurisdictions are "the same or different." *Id.* If different, the second step is to examine each jurisdictions' interest in having its own law applied to determine whether a "true conflict" exists. *Id.* Finally, if the court finds there is a true conflict, it must ask "which state's interest would be more impaired if its policy were subordinated to the policy of the other state." *Id.* There is no basis to invoke California law on behalf of Golbeck or the putative nationwide class.

a. The Court should again dismiss Golbeck's California intrusion upon seclusion claim

The Court previously determined that California's three-pronged governmental interest test disqualifies Golbeck from pursuing a claim for intrusion upon seclusion under California law (*see* Ord. at 18-22), and nothing alleged in the FAC changes that result.

First, the Court rejected Plaintiffs' argument that there's only a "superficial difference[]"

between California's and Florida's intrusion upon seclusion claim, instead emphasizing Florida's distinct requirement that plaintiffs "show an intrusion into a private place [or quarter] and not merely a private activity." (*Id.* (quoting *Hammer v. Sorensen*, 824 F. App'x 689, 695 (11th Cir. 2020))); *see also infra* Section III(B)(1)(a). Nothing in the FAC changes that conclusion. Golbeck does not allege any facts that eliminate the Florida requirement that the alleged intrusion be into a private place or quarter, and significant differences remain between the laws of California and Florida, warranting the same finding under the first prong that the two states' laws differ in a way that is "neither 'trivial [n]or wholly immaterial.'" (Ord. at 19-20.)

Second, the Court found a true conflict exists because there was "indeed a possibility that a successful claim under California law would fail to be meritorious under [Florida law]." (*Id.* at 20.) The Court considered the states' differing interests and policy choices: (i) Florida's "private quarter" requirement; (ii) the fact that intrusion upon seclusion "necessitates consideration of legal and social norms," which are not uniform across the fifty states; (iii) the fact that "Florida's [intrusion upon seclusion] laws have not stretched to reach claims premised on the collection of online data;" and (iv) that Florida has considered but failed to enact "consumer privacy legislation conferring substantive data privacy rights in the way that California has done." (*Id.*) Those same grounds for a true conflict exist here. Though the Florida legislature recently enacted new data privacy legislations for its citizens, it is not operative until July 1, 2024, and its reach is significantly narrower than that of the CPRA.[6] Moreover, the balance of the remaining factors still demonstrates a fundamental conflict between the two states' intrusion upon seclusion claims. Oracle is unaware of a single intrusion upon seclusion claim under Florida law successfully made involving the collection of web browsing data (ECF No. 35 at 5), and for good reason. Because Florida requires intrusions into a private "place," it is ill-suited to claims arising out of the collection of information from publicly available businesses and websites. (*See infra*

[6] Florida Senate Bill 262, creating a Digital Bill of Rights, was signed into law by Governor DeSantis on June 6, 2023. *Compare* Fla. Stat. § 501.702(9) (applying to businesses that have an annual gross revenue exceeding $1 *billion* and that derive at least *half* their global revenue from selling online ads or providing targeted advertising) *with* Cal. Civ. Code § 1798.140(d) (applying to businesses that have annual gross revenues over $25 *million* or otherwise obtain personal information on 100,000 or more consumers).

Section III(B)(1)(a).)

Third, Golbeck unsuccessfully attempts to establish that California's interest would be more impaired if its policy were subordinated to that of Florida by adding allegations purporting to establish California as the "place of the wrong." (FAC ¶¶ 28-30); *see also Hernandez v. Burger*, 102 Cal. App. 3d 795, 802 (1980) (concluding that "with respect to regulating or affecting conduct within its borders, the place of the wrong has the predominant interest"). According to Golbeck, California is the "place of the wrong" because the "last acts to make Oracle liable"—*i.e.*, Oracle's alleged "creation, maintenance, and provision" of purported data profiles "to third parties"—occurred in Redwood City. (FAC ¶ 28.) The Court has already rejected this argument, concluding instead that the "place of the wrong" was outside California because "the 'last event[s]' involved in the collection and interception of data [] were made possible by an intermediary that may or may not be located in the state." (Ord. at 21.)

Nothing in the FAC revives Golbeck's claim. She alleges that the "last act" attaching liability to Oracle occurred in California, while simultaneously alleging that Oracle's intrusion happened when bk-coretag.js intercepted her web browsing data. (*See* FAC ¶¶ 44-50 (alleging that bk-coretag.js intercepts communications "[w]hen a user opens an Internet webpage").) This interception, however, would have happened where Golbeck was located, presumably not in California. (Ord. at 21 ("Plaintiffs interactions with the third-party websites do not necessarily take place in California—and presumably do not, when considering [Golbeck].") Thus, "the last event *necessary to make the actor liable*"—Golbeck's "interactions with the third-party websites"—occurred in Plaintiff's home jurisdiction. (*Id.*; *Mazza*, 666 F.3d at 593 (emphasis added));[7] *see also Popa v. Harriet Carter Gifts, Inc.*, 52 F.4th 121, 130-32 (3d Cir. 2022) (reasoning from Ninth Circuit and other authority that electronic communications are intercepted on plaintiffs' browsers—*i.e.*, where the cookies sit and reroute data). Notably, Golbeck does not place herself or her web browsing activity in California.

[7] The case Plaintiffs cite in the FAC is consistent with Oracle's position. (FAC ¶ 29 (citing *Oman v. Delta Air Lines, Inc.*, 889 F. 3d 1075, 1079 (9th Cir. 2018)).) Unlike in *Oman,* the conduct that "create[d]" liability here occurred *outside* California, on Plaintiffs' browsers. *See Oman*, 889 F.3d at 1079.

Golbeck's contention that California has the greater interest in non-resident members of the putative class because of the CPRA must also be rejected. The plain text of the statute makes clear that it does not apply to non-Californians. Cal. Civ. Code § 1798.140(i) (defining a "[c]onsumer" as "a natural person who is a *California resident*") (emphasis added); *see also Hayden v. Retail Equation, Inc.*, 2022 WL 2254461, at *5 (C.D. Cal. May 4, 2022), *on reconsideration*, 2022 WL 3137446 (C.D. Cal. July 22, 2022). The allegations in the original Complaint were insufficient for the Court to extend claims for intrusion upon seclusion under California law to residents of other states, including Florida, and nothing alleged in the FAC requires a different conclusion here.

b. The Court should dismiss Golbeck's California unjust enrichment claim

As with Golbeck's California intrusion upon seclusion claim, her unjust enrichment claim also fails California's three-prong governmental interest test and must be dismissed.

First, Florida and California law differ on unjust enrichment. *Mazza*, 666 F.3d at 590. While California requires that the plaintiff "show that the defendant received and unjustly retained a benefit at the plaintiff's expense," the plaintiff does not need to allege defendant's knowledge and acceptance of the benefit. *ESG Cap. Partners, LP v. Stratos*, 828 F.3d 1023, 1038 (9th Cir. 2016). Florida, however, requires plaintiff to prove that the defendant had "knowledge" and "accept[ance]" of the benefit. *See N.G.L. Travel Assocs. v. Celebrity Cruises, Inc.*, 764 So. 2d 672, 675 n.5 (Fla. Dist. Ct. App. 2000). Moreover, Florida demands that the "benefit" be conferred "directly" on the defendant, whereas California has no such requirement. *Kopel v. Kopel*, 229 So. 3d 812, 818 (Fla. 2017). The Ninth Circuit recognized these fundamental differences in *Mazza* when it found "[t]he elements necessary to establish a claim for unjust enrichment … vary materially from state to state." 666 F.3d at 591 (refusing to certify a nationwide class for unjust enrichment); *see also In re Toyota RAV4 Hybrid Fuel Tank Litig.*, 534 F. Supp. 3d 1067, 1122 (N.D. Cal. 2021) (same, but at pleading stage).

Second, those legal differences represent a "true conflict" between the states, as Florida's "direct benefit" requirement substantially undermines Golbeck's unjust enrichment claim.

Mazza, 666 F.3d at 590; *see Kopel*, 229 So. 3d at 818; *see also infra* Section III(B)(6). Golbeck alleges Oracle received her data through data partners and customers who deployed cookies, the bk-coretag.js, and other pixels on their websites. (FAC ¶¶ 44-50.) Because Oracle allegedly received Golbeck's data through "intermediar[ies]," she has failed to allege that she directly conferred her data, or any benefit derived from it, on Oracle. (Ord. at 18 n.11); *see also Peoples Nat'l Bank of Com. v. First Union Nat'l Bank of Fla., N.A.*, 667 So. 2d 876, 879 (Fla. Dist. Ct. App. 1996) (dismissing unjust enrichment claim where intermediary bank, and not plaintiff lender, directly distributed overpayments to defendant lenders).

Third, Florida's "interests would be more impaired if its policy were subordinate" to the policy of California, and therefore Florida law must govern Golbeck's claim. *Mazza*, 666 F.3d at 598 (citation omitted); *see also Hernandez*, 102 Cal. App. 3d at 802 (finding "the place of the wrong has the predominant interest"). Here, "[Golbeck's] interactions with the third-party websites"—the activity underlying her unjust enrichment claim—"presumably [did] not" occur "in California" and her new allegations fail to demonstrate otherwise. (Ord. at 21.) Rather, as the Court has already found, "the state where the last event necessary to make the actor liable occurred" was Florida—where she and her browsers and devices are located. (*Id.* at 20); *see supra* Section III(A)(1)(a). Thus, Florida's interest in applying its own laws to its citizens outweighs California's "little interest in applying its law to compensate citizens of [other states]." *See Paulo v. Bepex Corp.*, 792 F.2d 894, 896 (9th Cir. 1986). Golbeck's California unjust enrichment claim should be dismissed.

2. Plaintiffs cannot assert California claims on behalf of non-resident members of the putative nationwide class

The Court should once again reject Plaintiffs' attempts to expand California law well beyond its intended reach. (*See* Ord. at 18-22.) Plaintiffs each seek to represent a proposed nationwide class for claims brought under California law, without a plausible basis of residency or location of injury in California. *See In re Apple & AT&T iPad Unlimited Data Plan Litig.*, 802 F. Supp. 2d 1070, 1076 (N.D. Cal. 2011) (dismissing CLRA and UCL claims by non-California residents who purchased their iPad and data plans outside of California); *Granfield v. NVIDIA*

Corp., 2012 WL 2847575, at *2-3 (N.D. Cal. July 11, 2012) (dismissing out-of-state plaintiffs' California claims where plaintiff purchased her computer in Massachusetts); *see also In re Toyota RAV4 Hybrid Fuel Tank Litig.*, 534 F. Supp. 3d at 1122 (dismissing California unjust enrichment claim as to nationwide class based on variability in state laws). In fact, the overwhelming majority of putative class members would not have a single connection to the state. "California's interest in applying its law to residents of foreign states is attenuated," particularly where "the claims of foreign residents concern[] acts that took place in other states." (Ord. at 20 (quoting *Mazza*, 666 F.3d at 594).) This Court has already held that in light of differing community standards and legal frameworks among states, the law of California should not be applied nationwide. (Ord. at 21.) As demonstrated above, Plaintiffs have added nothing to the FAC to warrant a different finding here. (*See supra* Section III(A)(1).)

Plaintiffs' attempt to apply California claims to a nationwide class suffers from an additional issue: Oracle moved its headquarters out of California in 2020. (FAC ¶ 26 ("Until at least December 2020, Oracle's principal place of business is, or has been for the majority of the class period, Redwood City, California[.]").) Thus, even if Plaintiffs' mistaken logic about the locus of injury were to apply, *see supra* Section III(A)(1)(a), the alleged conduct since the move would have occurred outside the state. The Court expressed concern about this very issue, stating that Oracle's relocation "would only present additional hurdles in the choice of law analysis for selecting California as the law to apply nationally." (Ord. at 21 n.12.) Plaintiffs have done nothing to address the Court's concerns.

B. Plaintiffs' Third Through Ninth Causes of Action Fail Under Rule 12(b)(6)

A court must dismiss a claim under Rule 12(b)(6) if the plaintiff (1) fails to state a cognizable legal theory or (2) has not alleged sufficient facts establishing a claim to relief that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Conclusory allegations, without more, are insufficient to defeat a motion to dismiss. *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988). The Court must not assume the truth of legal conclusions merely because they are pleaded in the form of factual allegations. *Iqbal*, 556 U.S. at 677-79; *Twombly*, 550 U.S. at 555 (plaintiff must

plead "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"); Fed. R. Civ. P. 8(a)(2). The Court must dismiss Plaintiffs' third through ninth causes of action, many for the second time, because Plaintiffs fail to state a claim. Furthermore, the Court may deny Plaintiffs leave to amend where, like here, they have "fail[ed] to cure deficiencies by amendments previously allowed." *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892 (9th Cir. 2010).

1. Golbeck fails to state a claim for intrusion upon seclusion under Florida Law (third cause of action)

Generally, Florida courts follow the Restatement's two-prong approach to intrusion upon seclusion, requiring (i) an intrusion that is (ii) highly offensive to a reasonable person. *Hammer v. Sorensen*, 824 F. App'x 689, 695 (11th Cir. 2020); *see also* Restatement (Second) of Torts § 652B (1977). The Supreme Court of Florida, however, has construed the claim "even more narrowly than the Restatement provides." *Hammer*, 824 F. App'x at 695. Specifically, Florida law requires a plaintiff to "show an intrusion into a private *place* and not merely a private activity." *Id.* (citing *Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 161 n.3, 162 (Fla. 2003)) (emphasis added). Golbeck does not adequately allege either prong, warranting dismissal.

a. Golbeck has failed to allege intrusion into a private place

Under the first prong, Golbeck must plausibly allege intrusion "into a 'place' in which there is a reasonable expectation of privacy." *Spilfogel v. Fox Broad. Co.*, 433 F. App'x 724, 726 (11th Cir. 2011) (citation omitted). The Eleventh Circuit applies the "third-party doctrine" to determine whether the plaintiff's expectation of privacy was reasonable. *United States v. Trader*, 981 F.3d 961, 967 (11th Cir. 2020), *cert. denied*, 142 S. Ct. 296 (2021). The third-party doctrine stands for the principle that "a person lacks a reasonable expectation of privacy in information he has voluntarily disclosed to a third party." *Id.* (citing *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979)). While Golbeck alleges Oracle collected data on both her offline and online behavior, (FAC ¶¶ 12-19), critically absent is a plausible allegation that Oracle accessed a private place. Golbeck's few particularized allegations point only to the collection of data from *publicly* accessible brick-and-mortar businesses (offline) and websites (online)—two domains where

Golbeck had no reasonable expectation of privacy from third parties. (*Id.* ¶¶ 12-17, 163-69); *see Spilfogel*, 433 F. App'x at 726. This is insufficient.

Offline. Golbeck alleges that Oracle collected her "location information," "real world movement data," and "brick-and-mortar store purchases," including from a third-party company called PlaceIQ. (FAC ¶¶ 16-17.) But her purported movements between physical "retailer locations, restaurants, gas stations, and banks," represent public activities outside a private domain, and were observable by countless strangers with whom she had no reasonable expectation of privacy. *See Adams v. State*, 436 So. 2d 1132, 1133 (Fla. Dist. Ct. App. 1983) (no reasonable expectation of privacy "when transacting" with a salesperson "in a place of business open to the public"); *see also Spilfogel*, 433 F. App'x at 727 (no intrusion upon seclusion in a conversation held on a city street where plaintiff "voluntarily placed herself in a public place"). The "third-party doctrine" applies with full force here, especially where the physical location records that Oracle allegedly obtained from PlaceIQ are confined to locations where Golbeck transacted business (FAC ¶ 16 ("retailer locations, restaurants, gas stations, and banks"); *id.* ¶¶ 4, 12, 57, 59, 64, 67, 102, 130, 147 (describing collection of data from "brick-and-mortar" retail locations), state only the name of the merchant rather than a particular address (*id.* ¶ 16 n.9; *see also id.*, Ex. B at 27-30), and therefore do not even begin to approach the revealing nature of location data held to be private.

Indeed, Golbeck's leap from merchant names to real-world "physical location[]" data is unsupported by any particularized facts and should be rejected. (*Id.* ¶ 16; *id.*, Ex. B.) Golbeck cites only to a PlaceIQ press release from 2016, contending it shows that Oracle gets "real world movement data" from PlaceIQ. (*Id.* ¶ 16 n.9.) But that press release states only that Oracle has access to PlaceIQ's finished "consumer audiences," which PlaceIQ "*built from* real world movement data and observations." *Id.* (emphasis added). Golbeck's OARRR, which lists only merchant names (not physical addresses), corroborates that Oracle does not receive any "real world movement data" from PlaceIQ. (*Id.*, Ex. B at 27-30.) There is no basis to infer that Oracle collected Golbeck's physical location data, and because the locations she alleges Oracle collected are from public merchants, Golbeck's allegations regarding offline data fail to support her

intrusion upon seclusion claim.

Online. Golbeck's allegations related to online tracking fare no better. The Eleventh Circuit has analogized surfing the web to navigating public highways, especially where internet users fail to undertake any effort to "shroud" their internet activity. *United States v. Taylor*, 935 F.3d 1279, 1284 n.4 (11th Cir. 2019) (comparing "browsing the open internet" to "traveling along the equivalent of 'public highways'"). Golbeck's theory that collecting web browsing data is "tantamount to erecting a camera in her home" is, therefore, directly contrary to the Eleventh Circuit's view. *Id.*; (FAC ¶ 163).

When someone accesses a website, the website owner, at a minimum, is aware of the visit—like a business owner recognizing that a person has walked into their shop. Behavior on a website, like behavior in a brick-and-mortar store, has no resemblance to behavior in the "solitude" of one's home, because the internet user has knowingly disclosed her presence to the website owner. *See Jacome v. Spirit Airlines Inc.*, 2021 WL 3087860, at *7 (Fla. Cir. Ct. June 17, 2021) ("[T]here can be no reasonable expectation of privacy from a third-party website owner when [an internet user] voluntarily browses through that third-party's website."); (*contra* FAC ¶ 163.) Moreover, an internet user also discloses her browsing history to at least one additional third party—the user's Internet Service Provider ("ISP"). Several circuit courts, including both the Ninth and Eleventh Circuits, are in accord that "subscriber information disclosed during ordinary use of the internet," such as IP addresses and web browsing history, fall within the "third-party doctrine" because ISPs are, by default, aware of internet user's conduct on the internet. *See Trader*, 981 F.3d at 968 (collecting cases); *see also United States v. VanDyck*, 776 F. App'x 495, 496 (9th Cir. 2019) (reaffirming that "internet users have no expectation of privacy in the IP addresses of the websites they visit" because "they should know" this information is provided to their ISPs) (citation omitted). Considering the numerous entities with whom Golbeck voluntarily shared her online movements, such online activity cannot constitute any intrusion into any private place.

b. Golbeck fails to allege a "highly offensive" intrusion

Golbeck's Florida intrusion upon seclusion claim also fails because she does not plausibly

allege that Oracle's conduct was so "outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." *Oppenheim v. I.C. Sys., Inc.*, 695 F. Supp. 2d 1303, 1309-10 (M.D. Fla.), *aff'd*, 627 F.3d 833 (11th Cir. 2010) (citation omitted). Nor can she.

Information *more* sensitive than anything at dispute in this case has failed under the Eleventh Circuit's "outrageous[ness]" standard:

- **Sensitive financial information found in a credit report.** *Celestine v. Cap. One*, 2017 WL 2838185, at *4 (S.D. Fla. June 30, 2017); *see also Stasiak v. Kingswood Co–Op, Inc.*, 2012 WL 527537 (M.D. Fla. Feb. 17, 2012) (obtaining credit report without permission does not rise to the level of outrageousness required for invasion of privacy).
- **Unredacted social security number.** *See Regions Bank v. Kaplan*, 2021 WL 4852268, at *13 (11th Cir. Oct. 19, 2021) (applying same outrageousness standard to publication of private facts and dismissing claim).
- **Private medical records.** *See Post-Newsweek Stations Orlando, Inc. v. Guetzloe*, 968 So. 2d 608, 613 (Fla. Dist. Ct. App. 2007) (dismissing publication of private facts claim).
- **Attorney-client communications.** *Id.*

The types of data on which Golbeck bases her claim—web browsing history, credit card purchases, and select data regarding retail store visits (FAC ¶¶ 12-18)—are a far cry from the sort of intrusions that Florida courts have found highly offensive. None of the online information allegedly collected (URLs, page visits, and interactions on a website) even approaches the sensitivity of information that courts have found outrageous. *Stasiak*, 2012 WL 527537, at *3. Nor can Golbeck meet the requisite threshold by alleging Oracle's collection spanned "hundreds of [] websites." (FAC ¶ 15); *see, e.g.*, *Shadlich v. Makers Nutrition LLC*, 2020 WL 5255133, at *2 (M.D. Fla. Sept. 3, 2020) (collecting cases where ongoing phone calls from debt collectors and telemarketers were not sufficiently outrageous for intrusion claims). The same is true for Golbeck's credit card purchases and location data ("offline data") (FAC ¶¶ 16-17), which are both derived from shopping behaviors and, by Golbeck's admission, convey generalized "spending habits and preferences." (*Id.* ¶ 17; *see also id.*, Ex. B (listing merchant names, interest segments, and the frequency of shopping at certain categories of stores)); *see also supra* Section III(B)(1)(a). Because Golbeck's allegations focus on "spending habits," such as the frequency she shops at certain stores (*Id.* ¶ 17; *see also id.*, Ex. B), this data is even less sensitive than that conveyed in a credit report, and not so "outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." *Oppenheim*, 695 F. Supp. 2d at 1309-10

(citation omitted); *see also Celestine*, 2017 WL 2838185, at *4 (dismissing intrusion upon seclusion claim involving unauthorized access of plaintiff's credit report over 86 times). Her Florida intrusion upon seclusion claim, therefore, must be dismissed.

2. Katz-Lacabe repeats his original CIPA claim, which again fails as a matter of law (fourth cause of action)

As before, Katz-Lacabe bases his CIPA claim on § 631(a) subsections (ii)-(iv): (ii) willfully attempting to read or to learn the contents or meaning of a communication in transit over a wire; (iii) attempting to use or communicate information obtained from the above conduct; and (iv) aiding and abetting another in the above conduct. Cal. Penal Code § 631(a); (*see* FAC ¶ 180).[8] Despite the Court's prior ruling, Katz-Lacabe alleges Oracle intercepted several types of web browsing data via its bk-coretag.js that, the Court held, do not constitute "contents" under the statute. (FAC ¶¶ 4-10.) While only two types of data ("referrer URLs" and "data entered into forms") survived the Court's prior "contents" analysis, Katz-Lacabe realleges all nine types of data with no new fact allegations in support. (*Id.*; *see also* Ord. at 15 n.9.) The FAC is essentially a motion for reconsideration as to the types of data the Court has already found to constitute non-actionable record information. (*Id.*) There is no reason to reverse course, and Katz-Lacabe's CIPA claim should be dismissed, at minimum, as to the types of information already rejected by this Court. (*Id.*) His claim must also be dismissed in its entirety for failure to allege "willful[]" interception. *See* Cal. Pen. Code § 631(a)(ii).

a. Katz-Lacabe realleges elements of his CIPA claim that the Court has dismissed as non-actionable record information

Katz-Lacabe reasserts his CIPA claim based on the same nine types of data on which he based his original claim. (FAC ¶¶ 47, 184 n.157.) The Court has already concluded that (1) webpage titles, (2) webpage keywords, (3) purchase intent signals, (4) add to cart actions, (5) page visits, (6) the date and times of website visits, and (7) IP addresses are "record information that do[] not constitute 'content'" under CIPA and there is no reason for a different

[8] Although CIPA § 631(a) is not formally separated into subdivisions, Oracle uses the subdivision structure for clarity. Katz-Lacabe does not allege a violation of subsection (i) for intentionally wiretapping with any telegraph or telephone wire.

outcome this time around. (*See* Ord. at 15 n.9 (quoting *In re Zynga Priv. Litig.*, 750 F.3d 1098, 1106 (9th Cir. 2014)).)[9]

Despite the Court's prior ruling, Katz-Lacabe again tries to argue that webpage titles, webpage keywords, purchase intent, and add-to-cart actions constitute "content."[10] The Court has already decided this issue. (Ord. at 15-16.) In fact, Katz-Lacabe cites the same cases in the FAC that Plaintiffs already put before the Court in their opposition to Oracle's original motion to dismiss. (FAC ¶ 184 n.157 (citing *In re Google RTB Consumer Priv. Litig.* ("*Google RTB*"), 606 F. Supp. 3d 935, 949 (N.D. Cal. 2022) and *Saleh v. Nike*, 562 F. Supp. 3d 503, 518 (C.D. Cal. 2021)); *see also* ECF No. 30 at 19 (same).) While these cases discuss the data as part of broader allegations, they do not hold that it is content. *See Google RTB*, 606 F. Supp. 3d at 949 (does not specifically identify webpage keywords and webpage titles as content); *see also Saleh*, 562 F. Supp. 3d at 518 (explicitly acknowledges "not all of this information may constitute [content]"). Other courts, meanwhile, have expressly found that this data is *not* content. *See Zynga*, 750 F.3d at 1106 (browsing history and URLs devoid of search terms are not "content"); *see also Yoon*, 549 F. Supp. 3d at 1082-83 (same, finding that unlike the "words of a text message or an email," this data does not convey substantive meaning); *Goldstein v. Costco Wholesale Corp.*, 559 F. Supp. 3d 1318, 1321 (S.D. Fla. 2021) (finding content views and mouse clicks on websites "did

[9] Oracle acknowledges the Court's ruling that Plaintiffs pled "just barely enough" regarding referrer URLs and webform entries. (Ord. at 16.) Oracle preserves its arguments that (i) referrer URLs constitute "content" only to the extent they contain "search terms," rather than "basic identification and address information" and (ii) data entered into webforms constitute "content" only to the extent they explain the meaning behind a person's communication with a website, such as the substantive answers to a questionnaire. *See Zynga*, 750 F.3d at 1107-09 (referrer URLs); *see In re Pharmatrak, Inc.*, 329 F.3d 9 (1st Cir. 2003) (webforms). The FAC remains devoid of particular allegations as to both.

[10] Katz-Lacabe does not add any allegations regarding page visits, the date and time of website visits, and IP addresses; nor does he offer any reason why the Court should depart from its earlier ruling that this data is not "content." (Ord. at 15 n.9.) Other cases in the Ninth Circuit are in accord. *See, e.g.*, *United States v. Reed*, 575 F.3d 900, 917 (9th Cir.2009) (holding "origination, length, and time" of telephone call was not "content"); *see also Yoon v. Lululemon USA, Inc.*, 549 F. Supp. 3d 1073, 1082 (finding IP addresses, pages viewed, and date and time of visit were not content). Moreover, Plaintiffs appear to have abandoned their wiretapping claims as to date and time of access and IP addresses altogether. Plaintiffs list these categories of data only in their generalized statement of facts (FAC ¶ 47), not in the substantive allegations under any wiretapping cause of action. (*See id.* ¶¶ 183 (CIPA), 199 (FSCA), 218 (ECPA).)

not convey the substance of any communication").[11]

Webpage titles and keywords express the attributes of a website, but do not explain why an internet user accessed that website. (*Contra* FAC ¶¶ 184, 186.) Similarly, purchase intent signals and add-to-cart actions are based on standalone mouse clicks—at best, they are conjecture about the meaning or purpose behind the action and, contrary to Katz-Lacabe's allegations, lack the expressive certainty of the words exchanged in a phone call to a bookstore. (*Id.*) Because these types of data do not reveal the "intended message conveyed" when users interact with a webpage they cannot qualify as "content[]." *Zynga*, 750 F.3d at 1106.

b. Katz-Lacabe fails to allege "willful" interception of the content of his communications

CIPA § 631(a) requires a showing that the defendant "*willfully* and without the consent of all parties" "reads, or attempts to read" the "contents" of a communication. Cal. Pen. Code § 631(a)(ii) (emphasis added). Katz-Lacabe has not alleged (and cannot allege) that Oracle acted with the requisite intent to violate CIPA.

Courts evaluating intent under other sections of CIPA require that the plaintiff prove the eavesdropping or interception was done "with the *purpose or desire*" of violating the elements of the statute, or with "*knowledge to a substantial certainty.*" *People v. Super. Ct. (Smith)*, 70 Cal. 2d 123, 134 (1969) (analyzing CIPA § 632's intent requirement) (emphases added). Section 631(a)'s willfulness requirement should be read consistently with the intent requirement in § 632. Cal. Pen. Code § 632(a) ("A person who, *intentionally* and without the consent of all parties to a confidential communication, uses [a device] to eavesdrop upon or record[.]") (emphasis added). California courts routinely treat willfulness interchangeably with intentionality. *See* Cal. Pen. Code § 7(1) (defining "willfully" to imply "a purpose or willingness to commit the act"); *see also People v. Atkins*, 25 Cal. 4th 76, 85 (2001) (interpreting "willfully" as acting "intentionally" but "without regard to motive or ignorance" of the law) (citation omitted). Because CIPA §§ 631(a) and 632 are "closely related" in the Legislature's goal of controlling the use of eavesdropping

[11] Because both the FSCA and CIPA base their "content" requirement on ECPA, the analysis is the same under all three. *See infra* Section III(B)(3)(c).

devices, "a general rule of statutory construction" requires that their willfulness and intentionality requirements be "construe[d]" the same. *Cal. Soc'y of Anesthesiologists v. Brown*, 204 Cal. App. 4th 390, 403 (2012); *see also* Cal. Pen. Code § 630 (expressing legislative intent).

The only allegation Katz-Lacabe makes in support of Oracle's purported intention to violate CIPA are two barebones claims that Oracle intended to use a recording device and that it acted "deliberate[ly]" and "purposeful[ly]." (FAC ¶ 188.) This fails as a matter of law. Katz-Lacabe fails to allege that Oracle intended to use a recording device for some impermissible purpose—*i.e.*, that Oracle *intentionally* (i) sought to capture the "content" of electronic communications (ii) without consent. *Id.*; *see also Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009) (expressing the general rule that a criminal statute's *mens rea* is applied to each element); *Lopez v. Apple, Inc.*, 519 F. Supp. 3d 672, 689 (N.D. Cal. 2021) (similarly applying CIPA § 632's intent requirement to its confidentiality element, where the statute prohibits intentional recording of confidential communications). ***First***, Oracle's customers customize the bk-coretag.js, deploy it for their own ad campaigns,[12] and choose what portion of the collected data they wish to share with Oracle. The fact that Oracle provides its customers with the bk-coretag.js tool does not establish that Oracle knew with "substantial certainty" that some of its customers *might* share and Oracle thereby might receive the "content" of a communication rather than record information. *See Smith*, 70 Cal. 2d at 134. Indeed, "deploy[ing] recording devices that *might* happen" to record the content of an internet user's communications is insufficient to establish intent. *Lozano v. City of Los Angeles*, 73 Cal. App. 5th 711, 727-28 (2022) (emphasis added). ***Second***, because customers configure the bk-coretag.js to fire on their websites (not Oracle's), and because it is those website operators, and not Oracle, that are in a position to disclose the cookies and obtain the user's consent, Oracle could not have known that the alleged

[12] Though Plaintiffs allege "Oracle places the bk-coretag.js" on its customers' websites (FAC ¶ 182), they admit each customer expressly permits Oracle to do so. (*Id.* ¶ 53 ("Oracle has agreements with numerous high-traffic websites like the New York Times, ESPN, and Amazon to place … pixels on their websites.").) And of course, despite Plaintiffs' allegations, each customer places the cookie on its own website, as Oracle has no way of altering the code of a third party's website.

data it received was collected without prior consent.[13] In fact, OA's privacy policy refers internet users to the disclosures on its customers' websites for notice of any collection practices. (FAC ¶ 109 n.140 (hyperlinking the OA Privacy Policy).)[14] As a result, any alleged impermissible capture of content could not have been done knowingly, intentionally, or willfully and Katz-Lacabe's CIPA claim should be dismissed in its entirety as a result.

c. Katz-Lacabe's CIPA claims under §§ 631(a)(iii)-(iv) also fail for failure to state a predicate claim

Katz-Lacabe's claims under CIPA §§ 631(a)(iii)-(iv) are predicated on a violation of §631(a)(ii). Cal. Penal Code § 631(a); *Tavernetti v. Super. Ct.*, 22 Cal. 3d 187, 192 (1978); *Mastel v. Miniclip SA*, 549 F. Supp. 3d 1129, 1137 (E.D. Cal. 2021). Because his CIPA § 631(a)(ii) claim fails in its entirety for failure to plausibly allege "willful[]" interception, so must his remaining ones. *Id.*

3. Golbeck fails to state a claim for wiretapping under the FSCA (fifth cause of action)

Golbeck asserts a single claim for violations of two sections of Florida's wiretapping statute, §§ 934.03(1)(a) and 934.03(1)(d). (FAC ¶¶ 192-93.) Subsection (1)(a) prohibits the intentional interception of the "contents" of an "electronic communication," while section (1)(d) punishes the "use" of information obtained as a result of such interception. *See also* Fla. Stat. § 934.03(1)(a), (d). Golbeck fails to state a claim under either section (1)(a) or (1)(d)[15] because the information allegedly obtained by Oracle's bk-coretag.js does not qualify under the FSCA's definition of "electronic communication" and she fails to plead that the information is subject to a

[13] Katz-Lacabe's "lack of specificity" in his allegations—his inability to offer a single example of either a full-string URL or web form allegedly collected by Oracle or identify even one website whose privacy policy was deficient in disclosing use of the bk-coretag.js—further undermines any argument that Oracle knew or had substantial certainty it was (i) receiving these types of data and (ii) receiving them without prior consent. (Ord. at 15.)

[14] For the same reasons as the Court previously found with respect to Plaintiffs' original Complaint, the OA Privacy Policy is incorporated by reference into the FAC because it is "referenced . . . by name and by link." (Ord. at 7); *Haskins v. Symantec Corp.*, 2013 WL 6234610, at *1 n.1 (N.D. Cal. Dec. 2, 2013) (taking judicial notice of website referred to extensively in complaint).

[15] Because Golbeck fails to state a claim under FSCA § 934.03(1)(a), and subsection (1)(d) is based on a predicate violation of subsection (1)(a), her claim under subsection (1)(d) also fails.

reasonable expectation of privacy. Separately, Golbeck's FSCA claim must fail as to the seven types of data this Court has previously found to constitute non-content record information. *See supra* Section III(B)(2)(a) & n.9.

a. Oracle's bk-coretag.js is outside the scope of the FSCA because the data it captures are not "electronic communications"

Florida courts have held that the FSCA does not apply to web-based JavaScript software, like the bk-coretag.js. *Jacome*, 2021 WL 3087860, at *3 (dismissing near-identical FSCA claims premised on "commonplace" JavaScript-based web analytics tools deployed to "improve a website browsers' experience"); *Cardoso v. Whirlpool Corp.*, 2021 WL 2820822, at *2 (S.D. Fla. July 6, 2021) (adopting *Jacome*'s ruling on similar facts); *Connor v. Whirlpool Corp.*, 2021 WL 3076477, at *2 (S.D. Fla. July 6, 2021) (same). This conclusion is supported both by the plain text of the Act and its legislative history.

The plain text of the statute confirms that the Legislature never intended to apply the FSCA to online analytics tools like Oracle's bk-coretag.js. Golbeck alleges the bk-coretag.js redirects the content of her electronic communications to website owners by sending a parallel electronic communication back to Oracle. (FAC ¶¶ 14, 45 (describing how the JavaScript code sends a "separate 'GET' request[]" to Oracle's servers containing "copies of contents in the initial" transmission to the website).) But because the FSCA defines "electronic communications" to exclude "*[a]ny* communication from an electronic or mechanical device which permits the tracking of the movement of a person or an object," Golbeck's alleged parallel transmission is exempt under the statute. *Jacome*, 2021 WL 3087860, at *3 (finding web communications entered on a website and transmitted by JavaScript software back to an analytics company "definitionally excluded" because the software "*tracks* a website browser's movements") (quoting Fla. Stat. § 934.02(12)(c)). Much like the software at issue in *Jacome*, Oracle's bk-coretag.js "tracks" a website user's movements and therefore falls outside the scope of the FSCA. *Id.*; (*see also* FAC ¶ 50 (alleging that "Oracle's bk-coretag.js JavaScript code has been recognized by security researchers as a tracking mechanism" and an "online activity 'tracker'").)

This plain text interpretation is supported by the legislative history. When the Florida legislature first passed the FSCA in 1969, it was concerned with wire and oral communications. *Jacome*, 2021 WL 3087860, at *2; *see also* Fla. Stat. § 934.01. The Florida Legislature added "electronic communications" only after Congress amended the ECPA in 1986 to include the term for purposes of protecting "computerized recordkeeping systems." *See State v. Jackson*, 650 So. 2d 24, 27 (Fla. 1995); *see also* Sen. Rep. No. 99-541, at 3 (1986). But even then, Congress, and by extension the Florida Legislature, were still unconcerned with the collection of routine browser information. *Jackson*, 650 So. 2d at 27 (noting that the FSCA "is modeled after" ECPA and that the court "may look to the federal legislative history as a guide"). Instead, they were focused on the transmission of (i) "financial records or funds transfers among financial institutions," (ii) "medical records between hospitals and/or physicians' offices," and (iii) "the transmission of proprietary data among the various offices of a company." *See* Sen. Rep. No. 99-541, at 3, 8; *see also Jacome*, 2021 WL 3087860, at *2. Importantly, Golbeck fails to allege Oracle's bk-coretag.js collects *any* data that falls within those categories. (FAC ¶¶ 197-99.)

b. Golbeck has failed to allege a reasonable expectation of privacy in her online browsing activity

Golbeck's FSCA claim fails for a separate and additional reason: under Florida law, she lacks a reasonable expectation of privacy in the data captured by the bk-coretag.js. Much like her Florida intrusion upon seclusion claim, *see supra* Section III(B)(1)(a), the FSCA requires Golbeck to sufficiently plead a reasonable expectation of privacy. *Jacome*, 2021 WL 3087860, at *3. Again, the third-party doctrine is critical to evaluating her claim. *See supra* Section III(B)(1)(a) (citing *Trader*, 981 F.3d at 967 ("[A] person lacks a reasonable expectation of privacy in information he has voluntarily disclosed to a third party.").) Golbeck cannot make this threshold showing for two reasons. ***First***, she had no "reasonable expectation of privacy" from the "website owner when [she] voluntarily browse[d] through" its website. *Jacome*, 2021 WL 3087860, at *7. All of Golbeck's data captured by the bk-coretag.js would have necessarily been exposed to the website owners who deployed the bk-coretag.js in the first place, and therefore ceased being private. ***Second***, the bk-coretag.js captured several categories of

"subscriber information"—such as URLs, page visits, IP address, date and time information—that Golbeck simultaneously shared with another third party: her ISP. *Trader*, 981 F.3d at 968 (affirming the third-party doctrine as to web "subscriber information" shared with ISPs). Thus, under the third-party doctrine, Golbeck forfeited any reasonable expectation of privacy in data captured by the bk-coretag.js. *Id.*

c. Golbeck's FSCA claim fails, at minimum, as to seven types of non-content information

Finally, Golbeck's claim fails in part because she fails to allege the interception of content information. The FSCA (like CIPA and ECPA) applies only to "contents" of a communication, which it defines as including "any information concerning the substance, purport, or meaning of that communication." Fla. Stat. § 934.02. The analysis of "content" under the FSCA is the same as under ECPA, and by extension, the same as under CIPA. *See Goldstein*, 559 F. Supp. at 1322 (applying Ninth Circuit law on ECPA's definition of "content" to a claim under the FSCA); *see also Brodsky v. Apple Inc.*, 445 F. Supp. 3d 110, 127 (N.D. Cal. 2020) (holding that the analysis of "content" is the same under both CIPA and ECPA). Golbeck's FSCA claim is premised on Oracle's alleged interception of the same nine types of internet browsing data as her CIPA and ECPA claims. (FAC ¶¶ 47, 199.) Because this Court has already determined that the "webpage titles, webpage keywords, the date and times of website visits, IP addresses, page visits, purchase intent signals, and add-to-cart actions" underpinning Katz-Lacabe's CIPA claim do not constitute "content," the same outcome is warranted here. (*See* Ord. at 15 n.9; *see also supra* Section III(B)(2)(a).)

4. Plaintiffs fail to state a claim under the ECPA (sixth cause of action)

Plaintiffs must show "an intentional interception of the contents [of] any wire, oral, or electronic communication through the use of a device" to establish a violation of the ECPA. (FAC ¶ 212); 18 U.S.C. § 2511(1)(a). As an initial matter, as the Court has already ruled (Ord. at 16), no violation exists where at least one party to the allegedly intercepted communication consented to the interception. *See In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1026 (N.D. Cal. 2014) ("[T]he consent of one party is a complete defense to a Wiretap Act claim."). The consent

of both parties is required only if plaintiff shows that the primary motivation or a determining factor in defendant's actions was to injure plaintiff tortiously. *Brown v. Google LLC*, 525 F. Supp. 3d 1049, 1067 (N.D. Cal. 2021). Here, too, the Court rejected Plaintiffs' view, concluding that the exception "does not apply to a case such as this." (Ord. at 16.) Additionally, and as with the CIPA claim, Plaintiffs have failed to allege that Oracle intercepted the "contents" of their communications. *See infra* Section III(B)(3)(c) ("content" analysis is the same for all three wiretapping statutes).

Plaintiffs do not allege *any* facts that alter the Court's previous ruling that the consent of Oracle's customers dooms their ECPA claim, and instead attempt to plead that the crime-tort exception applies to Oracle's conduct. (*See* FAC ¶¶ 226-29 (alleging Oracle intercepted their information "for the purpose of committing any criminal or tortious act") (quoting 18 U.S.C. § 2511(2)(d)).)[16] As the Court previously found, the crime-tort exception does not apply here, "where Defendant's 'purpose has plainly not been to perpetuate torts on millions of Internet users, but to make money.'" (Ord. at 16 (quoting *Rodriguez*, 2021 WL 2026726, at *6 n.8).) The same result is warranted.

In their second attempt to invoke the exception, Plaintiffs still do not come close to alleging that the primary motivation or a determining factor in Oracle's actions was to injure Plaintiffs tortiously. *Brown*, 525 F. Supp. 3d at 1067. Instead, they merely state, in a conclusory manner, that Oracle acted with the intent to invade Plaintiffs' privacy. (*See, e.g.*, (FAC ¶¶ 226-27, 229.) The Court should reject Plaintiffs' mere "formulaic recitation of the elements" of this cause of action. *See Twombly*, 550 U.S. at 555.[17] Moreover, Oracle's alleged conduct—the purported collection and sale of consumer data—is, by Plaintiffs' own admission, motivated by

[16] Plaintiffs' new allegation that "[a]ny disputes as to Oracle's intent under the wiretapping statute are to be decided by the jury" (FAC ¶ 229), is contradicted by case law. Courts regularly resolve the issue of a defendant's intent at the pleading stage—just as this Court has already done in this case. (Ord. at 16); *see Rodriguez v. Google LLC*, 2021 WL 2026726, at *6 n.8 (N.D. Cal. May 21, 2021); *In re Google Inc. Gmail Litig.*, 2014 WL 1102660, at *18 n.13 (N.D. Cal. Mar. 18, 2014). Oracle's intent under ECPA, and by extension, the applicability of the crime-tort exception, can be decided at this stage of litigation.

[17] Plaintiffs cherry-pick an out-of-context quote from Oracle's CEO in 2016 (FAC ¶ 227), but that quote does nothing to establish that Oracle acted with the *primary* motivation to commit a tort, as required.

profit, not by a desire to invade Plaintiffs' privacy. (*See, e.g.*, FAC ¶ 248 (alleging Oracle "*profited* from disclosing users' browsing histories, internet activity, and real world activity") (emphasis added); *id*. ¶ 42 ("Oracle . . . *monetizes* this data") (emphasis added).) Plaintiffs allege that the "mere existence" of this lawful purpose does not "sanitize" an interception done for an "illegitimate purpose." (FAC ¶ 228 (quoting *Sussman v. ABC*, 186 F.3d 1200, 1202 (9th Cir. 1999).) This misses the point; there is nothing for Oracle to sanitize given that it did not act with any "illegal or tortious purpose" to start. *Sussman*, 186 F.3d at 1203. Plaintiffs fail to allege any facts to show that Oracle's primary motivation was to tortiously capture the contents of their communications, which requires dismissal of the ECPA claim, with prejudice.

5. Katz-Lacabe fails to state a claim for unjust enrichment under California law (seventh cause of action)

To state a claim for unjust enrichment under California law, Katz-Lacabe must allege: (1) receipt of a benefit, and (2) unjust retention of the benefit at the expense of another. *Stratos*, 828 F.3d at 1038. Plaintiff's allegations as to the second prong fail.[18]

As an initial matter, Katz-Lacabe did not comply with two clear instructions from the Court. ***First***, the Court asked Katz-Lacabe to show that he "directly expended [his] own resources" or "that [his] property has become less valuable." (Ord. at 17); *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 600 (9th Cir. 2020). Katz-Lacabe has done neither, which alone warrants dismissal of this claim with prejudice. His allegation that he is not required to show a corresponding loss are beside the point. (*See* FAC ¶¶ 240-48.) ***Second***, the Court asked him to explain "why the access [he] received to [Oracle's customers' websites] would not defeat the unjust enrichment claim." (Ord. at 18 n.11.) He does not do so, and again, his failure here requires dismissal with prejudice.

Separately, Katz-Lacabe does not establish any adequate basis for his claim that it would be "unjust" for Oracle to retain his data. *See Stratos*, 828 F.3d at 1038. His allegations are

[18] Because California law cannot be applied extraterritorially to Golbeck or the proposed nationwide class (*see* Section III(A), *supra*), Oracle construes the California unjust enrichment claim as alleged solely by Katz-Lacabe and the California sub-class. Should the Court decide that extraterritorial application is warranted, Oracle's arguments here should apply to both Plaintiffs.

two-fold: (1) he did not consent to Oracle's collection or use of his data (FAC ¶¶ 249-50); and (2) Oracle's conduct constitutes an "invasion of privacy," and is therefore "inherently unjust" (*see* FAC ¶¶ 249, 249(a), 252). Neither is sufficient. ***First***, the Court already rejected the consent argument: "Plaintiffs here were at no time in direct privity with Oracle. As a result, Defendant did not collect information from Plaintiffs in a manner contrary to expectations created by the consent process." (Ord. at 17 (citing *Hart v. TWC Prod. & Tech. LLC*, 526 F. Supp. 3d 592, 597 (N.D. Cal. 2021)).) Although given an opportunity to amend, Katz-Lacabe does not (and cannot) establish that he is in direct privity with Oracle. (*See, e.g.*, FAC ¶ 52.) ***Second***, Katz-Lacabe's conclusory allegation that Oracle's conduct was "inherently unjust," without more, is insufficient to state a claim. *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988) (holding that conclusory allegations are insufficient to defeat a motion to dismiss).

6. Golbeck fails to state a claim for unjust enrichment under Florida law (eighth cause of action)

To state a claim for unjust enrichment under Florida law, Golbeck must adequately plead that: (1) she has "conferred a benefit on the defendant, who has knowledge thereof; (2) defendant voluntarily accept[ed] and retain[ed] the benefit conferred; and (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying the value thereof to the plaintiff." *Hillman Const. Corp. v. Wainer*, 636 So. 2d 576, 577 (Fla. Dist. Ct. App. 1994). Florida courts dismiss unjust enrichment claims where plaintiffs received the benefit of the bargain. *See N.G.L.*, 764 So. 2d at 675 ("Unjust enrichment 'cannot exist where payment has been made for the benefit conferred.'") (citation omitted). Similar to Katz-Lacabe (*see* Section III(B)(5), *supra*), Golbeck fails to allege that she has not received the benefit of the bargain given that she has been able to freely access "hundreds" of websites. (FAC ¶ 15.)

Additionally, Florida's unjust enrichment law demands that the "benefit" be conferred "directly" on the defendant. *Kopel*, 229 So. 3d at 818. Even accepting Golbeck's argument that she has conferred a benefit on Oracle, she does not make any allegations that this benefit was conferred "directly." Both the Court's order and Golbeck herself acknowledge that Oracle's customers collect consumer information and provide it to Oracle. (*See* Ord. at 18 n.11 (stating

that Oracle has data "received and/or collected with permission from third [parties]"); *see, e.g.*, FAC ¶ 53 ("Oracle has agreements with numerous high-traffic websites like the New York Times, ESPN, and Amazon to place cookies and/or pixels on their websites.").) Oracle's customers are therefore the necessary intermediaries between Golbeck and Oracle, precluding any ability for her to "directly" confer a benefit on Oracle as contemplated by Florida law. *See Peoples Nat'l Bank*, 667 So. 2d at 879 (dismissing unjust enrichment claim where overpayments were distributed through an intermediary bank rather than directly by plaintiff). Her claim for unjust enrichment under Florida law therefore fails.

7. Plaintiffs' declaratory judgment claim fails to the same extent as their underlying claims, and because it is duplicative of the other remedies they seek (ninth cause of action)

Plaintiffs' claim for declaratory judgment fails for two reasons. ***First***, because it "rise[s] and fall[s] with [their] other claims," (Ord. at 22), and Plaintiffs have failed to allege facts sufficient to state a claim for their third through eighth causes of action, their associated claim for declaratory judgment must be dismissed to the same extent. ***Second***, Plaintiffs again fail to contend, as they must, that this claim seeks anything beyond what they seek in their underlying claims. *Tech & Intell. Prop. Strategies Grp. PC v. Fthenakis*, 2011 WL3501690, at *10 (N.D. Cal. Aug. 10, 2011).[19]

IV. CONCLUSION

Oracle respectfully asks the Court to (1) reject Plaintiffs' extraterritorial application of the second and seventh causes of action to Golbeck and the putative nationwide class and (2) dismiss Plaintiffs' third through ninth causes of action for failure to state a claim.

Dated: June 28, 2023

MORRISON & FOERSTER LLP

By: */s/ Purvi G. Patel*
Purvi G. Patel

Attorneys for Defendant Oracle America, Inc.

[19] In its Order, the Court deferred a decision on Plaintiffs' entitlement to equitable relief to a later stage of litigation. (Ord. at 23.) Oracle reserves all rights with respect to its arguments that equitable relief is unavailable where Plaintiffs have an adequate remedy at law. *See Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020).